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IN THE

Supreme Court of the United States

RAYMOND E. PRYOR, etc.,

Petitioner,

v.

AMERICAN PRESIDENT LINES,

Respondent.

HENRY A. SACILOTTO,

Petitioner,

v.

NATIONAL SHIPPING CORPORATION, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Your Petitioners, Raymond E. Pryor and Henry A. Sacilotto, pray that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Fourth Circuit entered in the above entitled cases on August 6, 1975.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit are to be published, but have not yet appeared in the appropriate advance sheets. The *Pryor* decisions and the *Sacilotto* decision may be found in the Appendix to this Petition.

JURISDICTION

Judgment in the *Pryor* case was originally entered on March 17, 1975, in favor of the Appellant, Raymond E. Pryor. Subsequently, the Appellee filed a Motion to Enlarge the Period of Time Within Which to File a Petition for Rehearing. This Motion was filed later than permitted by Rule, but notwithstanding this irregularity, the Court of Appeals permitted the Appellee to file a Petition for Rehearing. A Rehearing was had, and thereafter the Court entered a second Judgment on August 6, 1975. This Judgment withdrew the decision of March 17, 1975, and the case was decided in favor of the Appellee.

The *Sacilotto* case presented issues to the Court which were substantially identical to those raised by *Pryor*; and in reliance upon its decision in *Pryor,* the Court of Appeals on August 6, 1975 decided *Sacilotto* in favor of the Appellees therein.

An Application for Extension of Time Within Which to File this Petition was granted by Chief Justice Warren E. Burger on November 6, 1975. Pursuant thereto, this Petition for Writ of Certiorari was to be filed on or before November 11, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

DID THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERR IN FAILING TO APPLY THE PRINCIPLES OF ADMIRALTY LAW TO THE FACTS IN THESE CASES?

A. WAS IT ERROR FOR THE COURT OF APPEALS TO HOLD THAT *THE EXTENSION OF ADMIRALTY JURISDICTION ACT* REQUIRES THAT A SHIP PROXIMATELY CAUSE AN INJURY ON LAND BEFORE ADMIRALTY JURISDICTION WILL BE INVOKED?

B. DID THE COURT OF APPEALS ERR IN ITS HOLDING REGARDING THE NATURE AND EXISTENCE OF CAUSATION IN THE PRYOR CASE?

C. WAS IT ERROR FOR THE COURT OF APPEALS TO HOLD THAT GOODS BEING LOADED ONTO A SHIP FROM A RAILROAD GONDOLA CAR ALONGSIDE THAT SHIP, ARE NOT CARGO WHICH WILL RENDER THE SHIP UNSEAWORTHY IF THEY ARE DEFECTIVELY PACKAGED OR IMPROPERLY STACKED?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1, of the Constitution of the United States provides in pertinent part: "The judicial power shall extend . . . to all Cases of Admiralty and Maritime Jurisdiction. . . ."

UNITED STATES STATUTES INVOLVED

The Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 (1970), provides as follows:

> "Section 740. Injury done or consummated on land. —The admiralty and maritime jurisdiction of the

United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [§§ 781-790 of this title] or Suits in Admiralty Act [§§ 741-743, 744-752 of this title], as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this Act [June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act [28 §§ 1346, 1504, 2110, 2671 et seq.]: Provided further, that no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. (June 19, 1948, [illegible]6, 62 Stat. 496.)"

28 U.S.C. § 1333 provides that:

The District Court shall have original jurisdiction, exclusive of the Courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

Raymond E. Pryor and Henry A. Sacilotto, your Petitioners, are herein seeking review of two separate deci-

sions of the United States Court of Appeals for the Fourth Circuit. The final decisions in their respective cases were entered on August 6, 1975; the *Sacilotto* case having been decided upon the precedent of *Pryor*. The legal issues presented to the Court were substantially the same, although different factual situations existed in each case.

The Pryor case involved a Complaint by the Estate of Marion Stephens, against a vessel owner for injuries sustained on September 12, 1969. Stephens, a longshoreman, was engaged in loading the SS PRESIDENT PIERCE; at the time he sustained his injuries, he and his work gang were attempting to load coils of steel wire from a railroad gondola car alongside the vessel into that vessel's hold. Just prior to the accident, the Plaintiff's Decedent was on top of the car after having hooked a coil of wire to the vessel's crane. As the draft was being raised, an end of an adjacent coil of wire, which was not banded and which had been intertwined with the coil being raised, broke loose and knocked the Deceased Plaintiff from the car to the ground, thereby injuring him.

The Plaintiff's suit was filed based on allegations of negligence on the part of the ship's winch operator; and a three-prong claim of unseaworthiness was also made, alleging: that the ship had failed to provide a safe place to work, that the ship had accepted defective cargo, and that there was an unsafe plan of operation for the loading process. The Court's Admiralty Jurisdiction was invoked under 28 U.S.C. § 1333(1); and its Diversity Jurisdiction was specifically admitted.

Upon trial of this cause, the District Court found that the Plaintiff had failed to offer proof sufficient to sustain any findings of either negligence or unseaworthiness on the part of the vessel. The Court specifically held that the

winch operator had not been negligent and that there was ". . . nothing unsafe with the plan of operation . . .". Accordingly, the Court granted the Defendant's Motion to Dismiss filed pursuant to Rule 41, Subsection b, Federal Rules of Civil Procedure.

An Appeal was thereafter taken by the Plaintiff, and after submission of Briefs and Arguments of Counsel, the Court of Appeals in its decision entered on March 17, 1975, speaking through Judge Craven, noted that there were no findings at the District Court level as to whether the Defendant had failed to provide a safe place to work. Likewise, there was no determination as to whether or not the coil adjacent to the one which had been lifted from the gondola car was defective in its packaging or storage. Thusly, the Appeals Court was unable to determine whether the defective condition of the adjacent coil, if any, amounted to a failure to provide a safe place to work or otherwise contributed to the unseaworthiness of the vessel. These findings were not made at trial because, in Judge Craven's words, the District Court ". . . concluded that the ship had not accepted the *cargo*—the coil remaining in the gondola car". (emphasis supplied, see Appendix p. 3)

Judge Craven concluded his opinion by disregarding the District Court's acceptance theory, and noted ". . . it is clear that it (the ship) had begun the process of unloading the car, and at the time of injury, the winch operator was actually lifting aboard other coils from the same car. We think that if the latent and allegedly defective conditions of the adjacent coil—dormant, but compressed —was activated in the process of loading with the winch, *a sufficiently close causal relationship* would exist between the operation of the shift's gear and the injury, and we so hold." (Citations omitted, emphasis supplied, see Appendix p. 3).

It is clear that the Court of Appeals felt that there existed a causal relationship sufficient to support a claim of negligence against the ship cognizable under Admiralty Law; and they reversed the District Court on this point. As to whether or not the ship was rendered unseaworthy as a result of the defective condition of the coil of wire, the case was remanded for a new trial.

Subsequent to the decision of March 17, 1975, the Appellee filed a Motion to Enlarge Time Within Which to File Petition for a Rehearing. The Court of Appeals granted this Motion, and a Petition for Rehearing was filed. Upon consideration of this Petition, the decision of March 17, 1975, was withdrawn and a new decision entered on August 6, 1975.

This second decision discussed the rationale behind the element of causation required to sustain a claim of negligence in the Maritime Law. It concluded that the "but-for" causation principle of negligence is inapplicable to the determination of Admiralty Jurisdiction under the Extention of Admiralty Jurisdiction Act, 46 U.S.C. § 740 1970); and that a proximate causation is required.[1]

In the second decision, the Court of Appeals more fully came to grips with the issue as to whether or not the subject coils of wire had become cargo so as to render the ship unseaworthy as a result of their defective packaging and storage. The Court took into consideration the mere fact that the coils of wire were in a gondola car

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[1] While the Court in its decision of August 6, 1975, made lengthy discussions in reference to the issue of proximate cause, there was never a holding as to whether such causation existed in the instant case. This is particularly curious since the March 17, 1975, decision specifically held that a "sufficiently close causal connection" existed under the alleged facts. Apparently, the Court withdrew a prior holding without giving any reasons for its action. Also, it seems clear that this issue of causation has been reopened and now remains unsettled.

located on the pier and were not at the time affixed to the ship; and then it held that the ". . . no fault doctrine of unseaworthiness with respect to packaging (of goods) becomes operable seaward of the plank, that is, when goods first come to rest on shipboard, and thereafter continues to operate shoreward in the off-loading process to a point not remote in time and place." (See Appendix, p. 16)

The decision of the United States District Court for the District of Maryland was affirmed.

Regarding the case of *Sacilotto,* the facts as found by the District Court were essentially undisputed. The Plaintiff, a longshoreman, was engaged in the loading process at the time of the occurrence there in question. He and his work gang were endeavoring to remove from an open top gondola car, which was sitting alongside the SS CHENAB, twenty foot long steel billets measuring four inches by four inches in width. The Plaintiff's job on that particular day was to take a 'breaking-out' wire and place it beneath eighteen billets at a time, which were then lifted up slightly allowing Plaintiff to put a wooden chock under the bunch. The lifting was performed by the ship's boom. Normally, after the chock is put in, the billets are lifted higher and the wire is moved further along to prevent slippage and a chock is placed under the other end of the batch by another longshoreman to allow chains to be placed around the group of billets for lifting onto the ship. When the billets were being lifted on this particular occasion, a loose billet, one not in the batch being lifted, which had been bowed by the weight of the billets above it, sprang up and hit the Plaintiff, injuring him.

The District Court dismissed the suit on its finding that it had neither Diversity nor Admiralty Jurisdiction; and an Appeal was taken on the question of Admiralty Juris-

diction. The Court of Appeals, in reliance upon its decision in *Pryor*, stated that *Pryor* controlled the decision in *Sacilotto* and held that since the steel billets had not yet become the ship's cargo, and that since neither the ship's gear nor its operation in any way could be considered the proximate cause of the injury, there was no Admiralty Jurisdiction. The District Court's decision was affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN FAILING TO APPLY THE PRINCIPLES OF ADMIRALTY LAW TO THE FACTS IN THESE CASES.

A. IT WAS ERROR FOR THE COURT OF APPEALS TO HOLD THAT THE EXTENSION OF ADMIRALTY JURISDICTION ACT REQUIRES THAT A SHIP PROXIMATELY CAUSE AN INJURY ON LAND BEFORE ADMIRALTY JURISDICTION WILL ATTACH.

The Court of Appeals in its second *Pryor* opinion, interpreted the Extension of Admiralty Jurisdiction Act to require a proximate causal connection between a ship and a land-based injury before the Admiralty Law would be applied. (See Appendix, p. 11.) It is your Petitioner's contention that review of this holding should be granted for the following reasons.

To begin, the question as to what causation is required before the Act will confer Admiralty Jurisdiction is one which is not entirely clear. As a result, the Court of Appeals has experienced great difficulty with the determination of the requirement of causation in this case. The extent of this difficulty is evidenced by the fact that in the March 17, 1975, opinion, it held that ". . . if the latent

and allegedly defective condition of the adjacent coil—dormant, but compressed—was activated in the process of loading with the winch, a *sufficiently close* causal connection would exist between the operation of the ship's gear and the injury, and we so hold." (emphasis supplied, see Appendix, p. 3) Here, the Court is saying that if there is a "sufficiently close causal connection" between the ship and a land based injury, then the Act will confer Admiralty Jurisdiction, and the injured party will have the benefit of the substantive Maritime Law. This application is clearly consistent with the maxim that requires the Maritime Law to be applied in such a way so as to promote its humanitarian purposes. See *Garrett v. Enso Gutzeit O/Y,* 419 F2d 228, 1974 A.M.C. 319 (4th Cir. 1974) where the Court stated:

> In view of the *obvious trend to develop the humanitarian purposes of the warranty of seaworthiness,* we find no reason to apply a hypertechnical definition to the terms loading and unloading. (emphasis supplied)

Nevertheless, upon reconsideration of this case, the Court reversed its prior decision, and held instead that the Act requires a strict proximate causation of an injury before the Maritime Law will apply. (See Appendix, p. 11)

It is important to note that this second interpretation of the Act, which is a complete reversal of the Court's prior holding, and which is in conflict with accepted rules of construction, was rendered upon a scant discussion of two cases which were decided by the Court of Appeals for the Fifth Circuit: *Kent v. Shell Oil Co.,* 286 F.2d 746 (5th Cir. 1961), and *Adams v. Harris County,* 452 F.2d 994 (5th Cir. 1972), *cert. denied,* 406 U.S. 968 (1972). (See appendix, p. ....)

In *Kent*, supra, a truck driver was injured when a pipe rolled off the bed of his truck onto him as he stood on the pier; and in *Adams*, supra, a motorcyclist was injured when he ran into a drawbridge which had been lowered by the bridge operator who thought that a pleasure craft had signaled to pass through. In these cases, the 5th Circuit held only that Admiralty Jurisdiction did not apply to the facts then at bar. It did not decide as a matter of law that there existed a requirement of proximate causation before the Act would extend Admiralty Jurisdiction.

Your Petitioners contend the Court of Appeals for the Fourth Circuit has applied on incorrect requirement of proximate causation; and that the issue of whether proximate causation is required before the Extension of Admiralty Jurisdiction Act will be applicable, is a question which has not, but should be decided by this Court.

B. THE COURT OF APPEALS ERRED IN FAILING TO DETERMINE THE NATURE AND EXISTENCE OF CAUSATION IN THE PRYOR CASE.

In the first *Pryor* decision the Court held that a "sufficient causal connection" must exist between the ship and the longshoreman's injuries, to come within the purview of the Act. Subsequently, in the second *Pryor* decision, the Court reversed itself and held that a strict proximate causation was required. Unfortunately, the Court never reconsidered the issue of whether the requisite causation existed in this case to satisfy the test of proximate causation. As a result, the second decision is inconsistent with the first and it has left unresolved the question of causation.

Your Petitioners contend that the specific issue of causation in this case should not be allowed to remain unresolved and should be considered by this Court.

C. IT WAS ERROR FOR THE COURT OF APPEALS TO HOLD THAT GOODS BEING LOADED ONTO A SHIP FROM A RAILROAD GONDOLA CAR ALONGSIDE THAT SHIP ARE NOT CARGO WHICH WILL RENDER THE SHIP UNSEAWORTHY IF THEY ARE DEFECTIVELY PACKAGED OR IMPROPERLY STACKED.

In speaking to the allegations that the injuries in each of these cases were caused by defective packaging or storage of goods being loaded onto a ship, the Court held that such defects would not render a ship unseaworthy until the goods became cargo. Recognizing the need for a test to determine when goods become cargo it then held that goods do not become cargo so as to render a ship unseaworthy as a result of defects in packaging or storage, until they "... first come to rest on ship board." (See Appendix p. 16) This holding was an incorrect attempt to apply a settled facet of Admiralty Law; and as a result, it is in direct conflict with the decisions of this Court and the other Circuits.

This Court's attention is drawn to *In Re Smith-Rice No. 4 and Smith-Rice No. 18,* 323 F.Supp. 44, 1972 A.M.C. 191, (1972), where the Court specifically held that a crane which was being dismantled preparatory to its being loaded upon a ship had not yet become cargo, nor could it become cargo *until it was ready to be and in the course of being loaded onto the barges and its component parts* (emphasis supplied).

The holding in *Smith-Rice,* supra, is clearly consistent with an observation made in *Victory Carriers, Inc., et al,* v. *Bill Law,* 404 U.S. 202, 1972 A.M.C. 1 (1971). There, Justice Douglas, in dissent, speaking in reference to the longshoreman, Bill Law, stated that he, Law, was driving

a forklift laden with *cargo* which was to be hoisted aboard the SS SAGAMORE HILL. (emphasis supplied) Clearly, Justice Douglas was taking judicial notice of an obvious fact, that is, that goods being loaded onto the ship are to be considered cargo so that the doctrine of unseaworthiness will operate to protect longshoremen involved in the loading process.

It is also important to note that this Court has recognized that goods in the process of being loaded onto a ship are to be considered cargo, and that a longshoreman injured in the process of loading due to defective cargo is entitled to the benefit of the doctrine of seaworthiness.

In *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 1963 A.M.C. 1649 (1963), a longshoreman was granted the benefit of Maritime Law in his action to recover for injuries sustained when he slipped on coffee beans which had been spilled in the unloading process. There is ample language in that opinion from which it may be concluded that the seaworthiness warranty will also be applied to containers of cargo being loaded. Justice White, speaking for the majority, therein stated:

> Seaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading . . . when a ship-owner accepts cargo in a faulty container or allows the container to become faulty, he assumes responsibility for injury that this may cause to seamen or their substitutes on or about the ship. (373 U.S. at 213-14)

Justice Harlan dissenting in *Gutierrez,* states that under the majority opinion therein consistency demands that the warranty of seaworthiness be applied to cargo containers not only when the cargo is being unloaded but also when it is being loaded.

> "Presumably the result reached by the court would be the same—at least consisting demands that it should be the same—If this accident had occurred on the dock while the beans were being *loaded* rather than unloaded. (emphasis in original 273 U.S. at 220)

These principles have been similarly applied in the case of *Thompson* v. *Calmar S.S. Corp.*, 331 F.2d 657, 1964 A.M.C. 2249 (3rd Cir. 1964), cert. denied 379 U.S. 913, where it is stated: "The owner of a vessel being loaded has an absolute non-delegable duty of care toward a longshoreman not to create a risk to him." In the *Thompson,* case, supra, the Plaintiff was a stevedore working aboard a gondola car loading steel onto the ship. In order to properly position the gondola cars, the ship's winch was used to move the freight cars. As it did so, the car on which the Plaintiff was standing was struck and he was knocked to the ground. The Court rejected the Respondent's contention that there was no Admiralty Jurisdiction because the occurrence happened on the pier rather than aboard the ship, and quoted from *Morales* v. *City of Galveston,* 370 U.S. 165, 1962 A.M.C. 1450 (1962): "A vessel's unseaworthiness may arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its storage might be improper." The Court further states: "The standard reasonable care required in discharging the cargo also applies with equal force to the loading of the cargo."

See also the case of *Garret* v. *Enso Gutzeit O/Y*, supra, in which bales of pulp paper were being stowed in the shed on the pier some twenty-five or more feet from the side of the ship. While attempting to jump a bale up to the fourth tier, the band broke, causing the bale to fall on the longshoreman. The Court held that the wire bands around the bales were the ship's cargo container. It

further stated: "Once cargo is accepted the shipowner becomes responsible for any injury caused by the defective condition of the cargo containers whether the injury occurs aboard the vessel or on the dock." The Court also concluded that "in view of the obvious trend to develop fully the humanitarian purposes of the warranty of seaworthiness, we find no reason to apply a hypertechnical definition to the terms loading and unloading." And in the case of *Reddick* v. *McAllister,* 258 F.2d 297, 1958 A.M.C. 1819 (2nd Cir. 1958), it was held that unseaworthiness may be predicated on the latent defect in the cargo crate.

It is clear that the plaintiffs in *Pryor* and *Sacilotto* were entitled to the protection of the Doctrine of Seaworthiness, and that their respective ships were unseaworthy as a result of the defective cargo. Accordingly, your Petitioners contend that the Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decisions of another Court of Appeals on the same matter and has decided a federal question in conflict with applicable decisions of this Court.

CONCLUSION

For the aforegoing reasons, it is prayed that this Honorable Court grant its Writ of Certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1699

Raymond E. Pryor,
Personal Representative of the Estate of
Marion L. Stephens, Deceased,

Appellant,

versus

American President Lines,

Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.

Herbert F. Murray, District Judge.

Argued February 5, 1975

Decided March 17, 1975

Before HAYNSWORTH, Chief Judge, and
CRAVEN and WIDENER, Circuit Judges.

Joseph F. Lentz, Jr., for Appellant;
John T. Ward (Ober, Grimes and Shriver on brief)
for Appellee.

CRAVEN, Circuit Judge:

This is a suit brought by the representative of a deceased longshoreman, Marion Stephens, against a vessel owner

for personal injuries sustained in the course of loading coils of wire aboard the S.S. President Pierce.

The court found the facts to be as follows. Coils of steel wire were being loaded on board the vessel from a railroad gondola car. The coils were stowed in the gondola car in two rows of coils laid end to end in the floor of the car and then one row of coils above them. At the time of injury coils from the top row were being taken aboard the vessel. The coil of wire that caused Stephens to fall off the gondola car was not one being lifted at the time, but rather was one that moved slightly after coils which had been threaded began to be lifted, thus lessening the tension against it.

The district court's findings are supported by substantial evidence and are not clearly erroneous.

The district court concluded that the winch operator on board ship was not negligent, and that the vessel's gear and equipment were not defective. He characterized the only claim of the plaintiff worthy of consideration as one of "unseaworthiness" and as "a three-pronged claim, the first prong of which is a contention that the ship failed to supply a safe place to work; second, that the ship had accepted defective cargo; third, that there was an unsafe plan of operation, in the sense that . . . Marion Stephens should have been required by the vessel owner to move further away from the cargo being loaded at the time his injury occurred." He disposed of the so-called third prong by finding and concluding that "the court sees nothing unsafe with the plan of operation here." But there are no findings with respect to whether there was a failure to supply a safe place to work. The court noticed that there was no evidence of "any actual defect in the cargo that was being loaded *at the time*" (emphasis added), but failed to find whether or not the adjacent coil remaining on the gondola car was defective and had "sprung out and flipped [Stephens] right off the gondola car," as Stephens had testified by deposition. Thus unresolved is the question of why and how much the coil moved and whether it sprang out and flipped Stephens off the car.

In short, we cannot determine from the district court opinion whether the coil of wire that was said to have shifted and caused Stephens' fall was improperly banded, or not banded at all when it should have been, and whether its defective condition, if any, amounted to a failure of the ship to supply a safe place to work and constituted unseaworthiness.

The reason the district court did not reach and determine whether there was a failure to supply a safe place to work and unseaworthiness was that he concluded that the ship had not "accepted" the cargo—the coil remaining in the gondola car. He found that there had been no evidence "that the vessel actually accepted the coils which the Plaintiff says caused his injury, in the sense that the longshoreman had not yet touched that coil . . . or made any attempt to try to take it onboard the vessel." We are not unsympathetic with the district court's common-sense effort to draw a line and to put on one side of it a ship's responsibility for defective cargo and on the other side of the line exoneration from liability caused by cargo not yet "accepted." But such a rule, we think, would create more problems than it would resolve. What if the master of the vessel, perceiving difficulty below, shouts "I reject" imediately before the injury occurs? Whether or not the ship had "accepted" the coil that caused Stephens to fall from the gondola car, it is clear that it had begun the process of unloading the car, and at the time of injury the winch operator was actually lifting aboard other coils from the same car. We think that if the latent and allegedly defective condition of the adjacent coil—dormant, but compressed—was activated in the process of loading with the winch, a sufficiently close causal relationship would exist between the operation of the ship's gear and the injury, and we so hold. *See* Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740 (970). *Cf. Gutierrez v. Waterman Steamship Co.*, 373 U.S. 206 (1963).

We reverse and remand for a new trial limited to the question of whether the ship failed to supply a safe place to work and whether the ship was rendered unseaworthy

by the allegedly defective condition of the coil of wire remaining in the gondola car.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1699

Raymond E. Pryor, Personal Representative of the Estate of Marion L. Stephens, Deceased,

Appellant,

versus

American President Lines,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Herbert F. Murray, District Judge

Argued February 5, 1975 Reconsidered (prior opinion withdrawn): August 6, 1975

Decided March 17, 1975

Before HAYNSWORTH, Chief Judge, and CRAVEN and WIDENER, Circuit Judges.

Joseph F. Lentz, Jr., for Appellant;
John T. Ward (Ober, Grimes and Shriver on brief) for Appellee.

CRAVEN, Circuit Judge:

We heard this case on February 5, 1975, and released our slip opinion on March 17, 1975. We held that if defectively packaged goods in a railroad car on a pier are released by action of a ship's winch so as to cause injury, there exists a sufficiently close causal relationship between operation of the ship's gear and the injury to invoke the admiralty doctrine of unseaworthiness. On petition for rehearing by American President Lines, *we withdraw our prior opinion.* We are now convinced that the law or admiralty has no application to the facts of this case, and that the claim of unseaworthiness is therefore untenable. For reasons that will be more fully stated, the decision of the district court dismissing the complaint will be *affirmed.*

I.

On September 12, 1969, Marion L. Stephens, a longshoreman employed by the Nacirema Operating Company, was injured while helping load coils of steel wire from a railroad gondola car onto the S.S. PRESIDENT PIERCE at the Pennwood Wharf in Baltimore. The coils had been stowed in the gondola car in three rows, two on bottom and the third on top of those two in pyramid formation. Stephens' job was to run a wire through the center holes of several coils and hook the eyes at the ends of the wire to the ship's cargo cable so that the ship's winch could lift the coils on board. He allegedly was injured when a coil of wire that he had not yet touched, sprang open just as the coils next to it were being lifted away by the winch. It is claimed that the jagged end of the coil caught Stephens' trouser leg and knocked him off the gondola car.

Stephens sued the shipowner, American President Lines, alleging unseaworthiness and negligence. He invoked that admiralty jurisdiction of the district court, 28 U.S.C. § 1333(1); *see* Fed. R. Civ. P. 9(h), but also alleged diversity of citizenship, which the defendant specifically admitted. Since the ad damnum was $50,000 the district court had jurisdiction under 28 U.S.C. § 1332 as well.

The case proceeded on the admiralty side of the court and was tried to the judge without a jury. The only evidence on the circumstances of the injury was Stephens' pre-trial deposition, introduced because Stephens had since died from an unrelated accident. At the close of plaintiff's case the defendant shipowner moved for dismissal under Rule 41(b). The district court, in an oral opinion, determined that it had admiralty jurisdiction, but found that the facts showed neither negligence nor unseaworthiness and dismissed the case. It found no evidence whatsoever of negligence, and plaintiff has not pressed that theory on appeal. As to unseaworthiness, it found no indication of a defect in the ship's gear and nothing unsafe about the plan of operation, and failed to find anything wrong with the coils. Further, the court stated that even had there been shown "some defective condition of the cargo, such as improper banding of the coils, or nonexistent banding of the coils," the unseaworthiness claim would still fail for lack of proof that the ship had "accepted" and thus become responsible for the coil that injured Stephens.

II.

A federal maritime claim may be asserted in federal district court either under § 1333, or, in consequence of the "saving to suitors" clause of that section, based on diversity of citizenship.[1] Because defendant admitted

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[1] Section 1333 reads, in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
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> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The phrase "saving to suitors in all cases all other remedies" has been interpreted to mean that maritime law can be applied on the civil side of federal district court, *see* Victory Carriers, Inc. v. Law, 404 U.S. 202, 204 (1971); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 410-11 (1953), or even in state court, *see* Romero v. International Terminal Operating Co., 358 U.S. 354, 361-63 (1959). *See generally* G. Gilmore & C. Black, The Law of Admiralty 33-36, 374-85 (1957); H. Hart & H. Wechsler, The Federal Courts and the Federal System 906-07 (2d ed. 1973).

facts in the court below that showed diversity jurisdiction, we find it unnecessary to address the question of whether the court was correct in determining that it had jurisdiction under § 1333. For, as the Supreme Court noted in *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 204 (1971), "under either section the claim that a ship or its gear was unseaworthy would be rooted in federal maritime law." The dispositive question, therefore, is not jurisdictional but whether maritime law applies to this claim.

The application of federal maritime law to alleged torts, whether negligence or unseaworthiness, has been governed historically by the locality of the harm. *Victory Carriers, supra,* at 205 and cases cited at n.2; *but cf. Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972) (suggesting that some relationship to traditional maritime activity must be shown in addition to "maritime locality"). Maritime law has been applied, in general, only to torts occurring on navigable waters, with the result in the case of injuries occurring on or about docked ships that "[t]he gangplank has served as a rough dividing line between the state and maritime regimes." *Victory Carriers, supra,* at 207.

The reach of federal maritime law depends upon the content of Art. III, § 2, cl. 1 of the Constitution, and must be defined by the courts as arbiters of that document. But the Supreme Court, deferring to the Congress, *see Executive Jet, supra,* at 272-74; *Victory Carriers, supra,* at 211-12, 216, has upheld congressional extensions so long as they do not transgress those ultimate "boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation." *Panama R.R. v. Johnson,* 264 U.S. 375, 386 (1924); *see also The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443, 453-58 (1851).[2] Thus, although

[2] U. S. Const. Art. III, § 2:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.

Although that clause appears on its face to be nothing more than a grant of jurisdiction empowering the federal courts to entertain ad-

the Court had earlier refused to permit recovery in admiralty for damage caused by a ship to persons or property on shore, *see Martin v. West*, 222 U.S. 191 (1911); *The Troy*, 208 U.S. 321 (1908); *The Plymouth*, 70 U.S. (3 Wall) 20 (1866), it allowed recovery for such an injury after Congress had passed the Admiralty Extension Act of 1948, 46 U.S.C. § 740, which states:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), the Court held that a longshoreman on the dock could recover on a claim of unseaworthiness when he slipped on loose beans that had spilled from defective bags as they were being unloaded from a ship. *See Victory Carriers, supra*, at 210-11 (interpreting the holding of *Gutierrez* as dependent upon the Admiralty Extension Act); 7A J. Moore Federal Practice ¶ .325 (Supp. 1973), at 106. Thus, because Congress had acted within the "boundaries . . . which inhere in" the maritime law, *supra*, the maritime law extended in *Gutierrez* to the shoreward side of the gangplank.

In *Victory Carriers*, however, the Court refused to permit a maritime suit by a longshoreman injured during the loading process when the overhead protection rack of his

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miralty suits, it has been interpreted in addition both as empowering federal courts to draw on and develop the substantive admiralty law and as empowering Congress to revise and supplement that law within constitutional limits as defined by the Supreme Court. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61 (1959). All three of these aspects of the Constitutional grant have been discussed by the courts, usually indiscriminately, under the rubric of "admiralty jurisdiction," Since the district court here had jurisdiction under § 1332 whether or not it did under § 1333, we deal in the opinion with only the latter two aspects—the substantive content and reach of admiralty law as delineated by the courts and by Congress. *Cf.* Mascuilli v. American Import Isbrandtsen Lines, Inc., 381 F. Supp. 770, 773 & n.5 (E.D. Pa. 1974).

forklift, owned by this stevedoring company, came loose and fell on him. The Court stated that "in the absence of congressional guidance," 404 U.S. at 204, maritime law would not be extended any farther beyond the gangplank than is authorized by the Admiralty Extension Act, and specifically that it would not cover any injury to a longshoreman simply because he was engaged in the process of loading a ship. *Id.* at 211, 214 and n.14.

After *Gutierrez* and *Victory Carriers* it is clear that maritime law does not reach an injury occurring off a ship that is being loaded or unloaded, *i.e.*, shoreward of the gangplank, unless the ship or some appurtenance of it[3] *causes* the accident within the meaning of the Admiralty Extension Act. Since the injury to Stephens in the instant case did not occur on the ship, the applicability of maritime law depends upon whether his injury was "caused" by the ship or its appurtenances.

Maritime law may conceivably be invoked upon either one of two theories: (a) the action of the ship's winch on the coil "caused" the injury, or (b) the defectively packaged coil had become ship's cargo so that its springing open was imputable to the ship, and in that sense the ship "caused" the injury.

What is the meaning of the word "caused" appearing in the Admiralty Extension Act? If "but for" causation is enough,[4] the action of the ship's winch in lifting neighboring coils to allow the coil that injured Stephens to spring open would invoke maritime law. If, on the other hand, the word means "proximate cause" the involvement of the winch does not support application of mari-

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[3] The text of the Admiralty Extension Act refers only to injuries caused by "a vessel." *See* text, *supra*, p. 7. The Supreme Court has interpreted the Act as extending the ship's liability for its crew and its "appurtenances" as well. Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 209-10 (1963); *see* Victory Carriers, Inc. v. Law, 404 U.S. 202, 210-11 (1971).

[4] Professors Harper and James use the phrase "cause in fact" to denote limitless causation—noting Eve's trespass caused all our woe. 2 F. Harper & F. James, The Law of Torts 1108 (1956).

time law, for the only permissible inference from the facts is that the proximate cause of the injury, assuming it was not simply an accident, was some defect in the banding of the springing coil not attributable to the ship; nothing indicated improper handling of the winch.

The Fifth Circuit has, we think, adopted a "proximate cause" construction in two cases. In *Kent v. Shell Oil Co.*, 286 F.2d 746 (5th Cir. 1961), the court held that maritime law did not apply when a truck driver was injured by oil field pipe that unexpectedly rolled off his truck bed onto him as he stood between his truck and the barge onto which the pipe was to be loaded. At the time of his injury the driver was trying to realign two displaced timber skids, along which the pipes were to be rolled from truck to barge. The court stated:

> There was . . . absolutely no evidence whatsoever *that anything done on the barge or in the handling of the skids caused the pipes to move or roll on* [the driver]. In a physical sense, this was due to the manner in which the pipe was loaded or left on the truckbed, was handled by the helper at the other end, or was not properly secured.
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> It might be argued that he would not have been in that position were it not for the skids being used. But the cause of the injury in no sense could be attributed to the vessel or its appurtenances, even if it is assumed that the skids were part of the barge's equipment. . . . This means that the "injuries" were non-maritime in nature. The extension of admiralty jurisdiction statute, 46 U.S.C.A. § 740, does not therefore make a classic non-maritime, land-based injury into something else.

286 F.2d at 749-50. And in *Adams v. Harris County*, 452 F.2d 994 (5th Cir.), *cert. denied*, 406 U.S. 968 (1972), the Fifth Circuit reversed a district court's finding that admiralty law extended to an injury suffered by a motorcyclist who ran into a draw-bridge barricade suddenly

lowered when the draw-bridge operator thought that an approaching pleasure craft had signaled to pass through. The district court had applied admiralty law because "there was a chain of events which began with the ship's approach to the bridge and subsequently moved landward to bring about plaintiff's injuries." 316 F. Supp. 938, 943 (S.D. Tex. 1970). The court of appeals disagreed:

> Did the vessel cause the injuries to the motorcyclist on the bridge? The vessel was simply approaching the bridge, as any vessel in those waters had a right to do. There is no showing that it was negligent in any respect. It is not charged with a tort of any kind. It had no control, could exercise none, and attempted to exercise none over the manner in which the bridge keeper performed his duties. . . . [T]he bridge keeper caused the bridge to begin to open, which, in turn, caused the barricade to drop, without any indication from the vessel that it was necessary to do so. The inescapable conclusion is that the dropping of the barricade was solely the act of the bridge keeper and no act of the vessel proximately caused his negligence, if there was any.
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> It inexorably follows that the injuries complained of were in no way caused by a vessel on navigable water. Jurisdiction is not saved by the Admiralty Extension Act.

452 F.2d at 996-97.

We agree with the Fifth Circuit, and so hold, that a ship or its appurtenances must proximately cause an injury on shore to invoke the Admiralty Extension Act and the application of maritime law. Both the congressional purpose behind the Act and considerations of federalism emphasized by the Supreme Court support this interpretation. Congress passed the Act "specifically to overrule or circumvent" a line of Supreme Court cases holding that maritime law did not extend to torts culminating in injury on land even when a ship on navigable waters was clearly the proximate cause. *See Victory Carriers, supra,* at 209 and n.8. There is no indica-

tion in the legislative history that Congress intended to go further and extend maritime law to land-based torts where a ship is not at fault, but supplies only a fortuitous but-for connection with an injury. *Cf. Di Paola v. International Terminal Operating Co.*, 294 F. Supp. 736, 740 (S.D.N.Y. 1968), *remanded on other grounds*, 418 F.2d 906 (2d Cir. 1969). The Supreme Court in *Gutierrez* neither suggested such a congressional intention nor indirated that such an extension would have been constitutionally permissible. The Court held only that maritime law applied when

> it is alleged that the shipowner *commits a tort* while or before the ship is being unloaded, . . . the impact of which is felt ashore at a time and place not remote from the *wrongful act*.

373 U.S. at 210 (emphasis added); *cf. Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 221-23 (1969).

Interpretation of the Act as requiring proximate cause also better accommodates federal and state interests than would but-for causation. In *Victory Carriers* the Supreme Court explained its reluctance to extend admiralty law farther than was supported by the Act:

> We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.

404 U.S. at 211-12. Although the Supreme Court was considering whether to go beyond the Act, while we are attempting to construe the Act itself, we believe the Court's admonition to "proceed with caution" applies

equally in this case. A "cause-in-fact" construction of the Act would open the way to displacement of state negligence law by federal admiralty law in many more situations than does the "proximate cause" construction,[5] and this would in turn open the district courts to many more claims by virtue of the federal admiralty jurisdiction, 28 U.S.C. § 1333.[6] As the Supreme Court noted, federal courts should "proceed with caution" in matters affecting their own jurisdiction as well as the reach of federal substantive law. *Cf. Healy v. Ratta*, 292 U.S. 263, 270 (1934). A "proximate cause" interpretation is an exercise of such caution.[7]

This leaves only the question of whether the coil said to have sprung open had become ship's cargo so that the ship was responsible for any defect in its banding. It is clear that an unseaworthiness claim exists against a ship under federal maritime law for improper stowage or defective packaging of cargo. *See Gutierrez, supra*, at 212-14; *Garrett v. Gutzeit*, 491 F.2d 228, 232 (4th Cir. 1974). But when do goods become "cargo"?

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[5] *See generally* 2 F. Harper & F. James, The Law of Torts, 1108-1110 (1956).

[6] A cause-in-fact interpretation would also, in circumstances like those here, make the applicability of federal maritime law turn on such a fortuity as whether the coils neighboring the allegedly defectively-banded one happend to be lifted by a ship's winch instead of a pier-based crane.

[7] For an example of the kind of involvement of a ship's equipment that would support application of maritime law under the Admiralty Extension Act, *see* Tucker v. Calmar Steamship Corp., 457 F.2d 440 (4th Cir. 1972), where this circuit in an opinion by the late Judge Sobeloff held that an unsafe method of loading had rendered a ship unseaworthy. As Judge Sobeloff stated, 457 F.2d at 442 n.1, "the proximate cause of [the] injuries was the unreasonable use of the ship's gear in loading operations, bringing the case within the rule of *Gutierrez* and the purview of section 740." *Compare also* Thompson v. Calmar Steamship Corp., 331 F.2d 657 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964) (unseaworthiness due to unsafe method of loading found where ship's winch and engines used to "bump" railroad cars into position for unloading, with result that plaintiff was knocked from a car and run over); Kloster v. S. S. Chatam, 475 F.2d 43 (4th Cir. 1973) (allegation that ship's crew was negligent in allowing mooring lines to become slack during gondola-to-ship loading was sufficient to bring suit in admiralty). *See generally* Snydor v. Villain & Fassio, 459 F.2d 365 (4th Cir. 1972).

We agree with the cases applying maritime law to injuries caused by defective stowing or packaging of goods in place on the ship's deck, *e.g., Rich v. Ellerman and Bucknall S.S. Co.*, 278 F.2d 704, 707 (2d Cir. 1960); *Reddick v. McAllister Lighterage Line, Inc.*, 258 F.2d 297, 299 (2d Cir.), *cert. denied sub nom. McAllister Lighterage Line, Inc. v. John T. Clark & Son, Inc.*, 358 U.S. 908 (1958). Such cases simply apply the rule of unseaworthiness in its time-honored place, seaward of the gangplank.[8] Fault is not an essential element of the doctrine of "unseaworthiness"[9] but conceptually and theoretically it may rest upon an irrebuttable presumption of opportunity to prevent harm. Once goods are put aboard, the condition of containers and packaging are within the control of the master of the vessel, and in most instances, although not all, defective packaging is discernible by inspection. If most defects are ascertainable it is a rough sort of

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[8] Once goods are in place on a ship the Admiralty Extension Act would usually not be needed to support the application of admiralty law, since in the normal case any injury from the goods would occur on the ship and on navigable water, and thus be within the traditional maritime jurisdiction. The Act would come into play, however, if such goods did not cause injury while in place, but only later during their unloading and on the pier. *See, e.g.*, Gutierrez v. Waterman Steamship Corp., 373 U.S. 206 (1963); Garrett v. Gutzeit, 491 F.2d 228 (4th Cir. 1974). The only limitation in such a case would be that the injury occur "at a time and place not remote from the wrongful act." *Gutierrez, supra*, at 210; *see Garrett, supra*, at 232-33.

[9] The first authoritative statement which recognized the right to recover damages for injuries caused by unseaworthiness was made in *The Osceola*, 7 Fed. Cas. 755, No. 3,930 (D. Pa. 1789). G. Gilmore & C. Black, The Law of Admiralty 316 (1957). It was said in that case that both ship and shipowner are "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." The use of the word "failure" in the last clause connotes an idea of fault, but it is now clear, as the doctrine of unseaworthiness has developed, that it is a no-fault concept. *See generally* Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 213 (1963); G. Gilmore & C. Black, *supra*, at 315-32. *But cf.* Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971) (no claim for unseaworthiness for injury caused by negligence of longshoreman who happened to be standing on ship's deck).

justice and not intolerable to assume that all are. Thus it is possible to say that the no-fault concept of unseaworthiness rests in part, at least theoretically, upon the ship's "fault" in failing to discern and correct conditions that may cause injury. Another reason, and perhaps a better one, for imputing responsibility for defective cargo to the ship is that once the ship is at sea the stress and strain of a voyage may break the packages, and it would thereafter be all but impossible to allocate responsibility as between the packager ashore and the ship's officers who subsequently undertake to move the cargo in a dangerous condition.

These factors do not come into focus when we concentrate upon goods in a railroad car on a pier—as yet untouched by the ship's gear. Not even theoretically may it be said there has been any opportunity to inspect; certainly not, as to a coil of wire held down by other heavy coils piled on it. When beans being unloaded from a ship spill on a dock, as in *Gutierrez,* who can say whether the spillage was caused by defective original packaging, movement at sea caused by the elements, or improper handling by the ship's crew? In such a situation the law throws up its hands and imputes liability to the last person in command of the situation. But if the beans are moving from the dock to the ship, as the coil of wire in this case, it is not possible even to surmise that defective packaging might have been caused by the ship's personnel.[10]

We are brought back again to the language of the Admiralty Extension Act that extends maritime law to injuries "caused by a vessel on navigable water." We assume the Congress, under Art. III, § 2 could have ex-

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[10] In *Gutierrez,* Mr. Justice Harlan said in dissent:

> Presumably the result reached by the Court would be the same—at least consistency demands that it should be the same—if this accident had occurred on the dock while the beans were being *loaded* rather than unloaded.

373 U.S. at 220 (emphasis in original). We think that he clearly meant that the Court's decision turned on the direction of the load—coming off the ship rather than being on-loaded.

tended maritime law shoreward by an enactment that the unseaworthiness doctrine should apply to all goods collected on a pier within a given distance from a ship for the purpose of being loaded aboard. *See* n.2 *supra.* Instead, the Congress chose the language "caused by a vessel." In so doing it embraced a fault idea that is applicable initially to invoke even a no-fault concept. Because it is not conceptually possible to charge the ship with having caused the defective packaging we think the no-fault doctrine of unseaworthiness is inapplicable on the facts of this case. For a ship to be responsible for injuries shoreward of the gangplank we think it must proximately cause injury to those ashore.

To hold otherwise is to embark upon endless line drawing until we get to a time and place "remote from the wrongful act." *See Gutierrez, supra,* at 210. But there has not even been a *wrongful act.* The ship's only act was using its winch in a proper manner without any opportunity to inspect and foresee that injury might occur if the top coil were lifted.

To go at the problem in terms of linear measurement from the ship, without respect to fault, invites caprice. Which factor is decisive: (1) physical contact with the railroad car, (2) piece-by-piece contact with packages in the car, (3) engagement of the ship's winch, (4) the beginning of the hoist or (5) somewhere in between, over the gangplank? Or do we go further from the ship: the next railroad car, perhaps, or all goods on the particular pier, or in the shipyard?

For all of the foregoing reasons, we hold that the no-fault doctrine of unseaworthiness with respect to packaging becomes operable seaward of the gangplank, *i.e.,* when goods first come to rest on shipboard,[11] and thereafter

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[11] In United States Lines Co. v. King, 363 F.2d 658 (4th Cir. 1966), this circuit upheld a jury verdict of unseaworthiness based, apparently, on a finding that defective metal bands used to bundle flitches were the proximate cause of a longshoreman's injury that occurred when some of the flitches fell from a forklift onto him during the process of loading the flitches onto a ship. Since it is clear from the opinion that the injury

continues to operate shoreward, in the offloading process, to a point not remote in time and place.[12]

To hold otherwise cannot be squared with the idea of causation expressed in the Admiralty Extension Act.[13] It would be absurd to exonerate the ship for its active conduct in operating its winch and then impute to it responsibility for defectively packaged goods it has not yet touched.

AFFIRMED.

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occurred on board the ship, maritime law was applicable under the traditional locality theory without any need for the Admiralty Extension Act. Thus the question was simply whether the defective bands could amount to defective cargo containers so as to render the ship unseaworthy. The court appears to have answered in the affirmative. 363 F.2d at 661. In part, however, *King* also rested on a theory that the bands were used as loading tackle, and therefore on Supreme Court cases that suggest a ship is responsible for the seaworthiness of any equipment on board. Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *see* G. Gilmore & C. Black, The Law of Admiralty 324-28 (1957). Our holding is consistent with *King*, since the flitches had once come to rest aboard ship before the injury. 363 F.2d at 660.

[12] Plaintiff urges that the district court erred in refusing to allow opinion testimony by an experienced longshoreman to the effect that improper banding probably caused the wire coil to spring open and knock Stephens off the gondola car. Since the court based its finding of no unseaworthiness partly on the absence of any evidence that the coils were improperly banded, this testimony was obviously very important. We need not decide whether exclusion of the testimony was reversible error because we have held that proof of defective banding would not support application of maritime law.

[13] Subjecting this ship to unseaworthiness liability, thus leaving the door ajar to even further extensions of maritime law and federal court jurisdiction, would also disregard the Supreme Court's admonition that we "proceed with caution" in this area. *See* text at page 14, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1952

Henry A. Sacilotto,

Appellant,

versus

National Shipping Corporation,
John T. Clark & Son of Maryland, Inc.,
John S. Connor, Inc.,
Bethlehem Steel Corporation,
United States Steel Corporation,

Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
R. Dorsey Watkins, District Judge.

Argued April 7, 1975 Decided August 6, 1975

Before CRAVEN and FIELD, Circuit Judges,
and CLARKE, District Judge.*

Joseph F. Lentz, Jr. for Appellant; Richard R. Jackson, Jr., Paul V. Niemeyer, (Piper and Marbury; Robert V. Barton, Jr.; Ober, Grimes, and Shriver; R. Roger Dreschsler; David R. Owen, Francis J. Gorman; Semmes, Bowen and Semmes; Donald C. Allen; J. Edward Martin; Theodore B. Oshrine; Allen, Theiblot and Alexander, on brief) for Appellee.

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* Sitting by designation.

CRAVEN, Circuit Judge:

Henry A. Sacilotto brought suit in district court seeking to invoke the admiralty jurisdiction, 28 U.S.C. § 1333, and the diversity jurisdiction, 28 U.S.C. § 1332, in order to raise claims for an injury incurred while Sacilotto was helping to load defendant's ship, the S.S. CHENAB. The district court dismissed the suit on its finding that it had neither diversity nor admiralty jurisdiction. Sacilotto has not challenged the ruling on the diversity point, and we agree with the district court that it had no admiralty jurisdiction. The dismissal is therefore affirmed.

The district court found the following facts bearing on the issue of jurisdiction:

> The essential facts of this case are undisputed. Plaintiff, a longshoreman, was engaged in the loading process as an employee of the stevedore (third party defendant), John T. Clark & Co. At the time of the occurrence in question, Plaintiff and his work gang were endeavoring to remove from an open top gondola car, which was sitting alongside the S.S. Chenab, twenty foot long steel billets measuring four inches by four inches in width. These billets had been placed in the gondola car by the shipper in two stacks, for balance, one over each set of wheels, and were stacked loosely or had been placed in the gondola car with wooden chocks to separate them while still red hot, *causing the chocks to burn out. In any event, they were 'dumped in there loose'* (Plaintiff's deposition at p. 12) at the time of the unloading of the gondola and loading of the ship.
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> Plaintiff's job on this particular day was to take a 'breaking out' wire and place it underneath eighteen billets at a time which were then lifted up slightly allowing Plaintiff to put a wooden chock under the bunch. The lifting was performed by the ship's boom. Normally, after the chock is put in, the billets are lifted higher and the wire is moved further along to prevent slippage and then a chock is placed under the other end of the batch by another longshoreman

> to allow chains to be placed around the group of billets for lifting onto the ship. When the billets were lifted after chocking, a loose billet, one not in the batch being lifted, *which had been bowed from the weight of the billets above it, sprang up and hit Plaintiff injuring him.* (Plaintiff's deposition at p. 26). According to Plaintiff, the actual cause of the accident was the failure to have chocks between the billets while in the gondola car and thus allowing such a bowing to occur from the weight of the billets scattered above it. (Plaintiff's deposition at pp. 32-35). He testified that such bowing *often occurs in unchocked loads but is unlikely to occur when chocks are properly placed between them.* (Plaintiff's deposition at p. 34). He further testified that the unloading was being done in the normal manner and that the ship's gear was working properly. (Plaintiff's deposition at pp. 25-26).

(emphasis in district court opinion).

The district court discussed the Supreme Court's decisions in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1962) and *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), which it considered controlling, and concluded that it lacked admiralty jurisdiction:

> [T]he steel billets had not as yet been rendered cargo and were therefore not an appurtenance of the ship so that this shorebased injury is not within the shoreward extension of admiralty jurisdiction occasioned by the Act as articulated by the *Gutierrez* case. . . . The defect of being improperly placed in the gondola car while alongside the ship awaiting loading onto the ship is not a breach of the stowage warranty (for indeed it was the shipper, not the ship, who stowed the billets in the gondola improperly) nor is it an injury caused by the ship or its appurtenances (since the clear cause of the injury was the manner in which the billets were stowed in the gondola).

In another opinion released today, *Pryor v. American President Lines,* No. 74-1699, we held that the substantive admiralty law did not apply to facts very similar to those here. That case controls this one. For the reasons developed at length in *Pryor,* an injury proximately caused by some defect in a shipment of goods (whether packaging, as alledged in *Pryor,* or stacking, as alleged here) that has not yet become ship's cargo, where the ship's gear or its operation is in no way culpable even though it is involved in a cause-in-fact sense, does not give rise to a claim in admiralty. It does not come within the traditional locality rule circumscribing admiralty's substantive jurisdiction, and the Admiralty Extension Act does not bring it within that jurisdiction.

In *Pryor* the district court had jurisdiction based on diversity of citizenship. Our holding was that the court could not apply the principles of admiralty law, including the doctrine of unseaworthiness. In this case, the fact that substantive admiralty law does not apply means that the court below lacked jurisdiction. Diversity was absent, and § 1333 by its terms gives jurisdiction only to claims arising in admiralty. *See generally Pryor, supra,* at n.1 and 2. Sacilotto is therefore relegated to state courts and state law.

AFFIRMED.

FILED

DEC 12 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-695

RAYMOND E. PRYOR, ETC.,
Petitioner,

v.

AMERICAN PRESIDENT LINES,
Respondent,

HENRY A. SACILOTTO,
Petitioner,

v.

NATIONAL SHIPPING CORPORATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in the *Pryor* case is reported at 520 F.2d 974; the opinion in the *Sacilotto* case is reported at 520 F.2d 983. Both opinions are printed in the Appendix to the Petition. The District Court opinion in *Sacilotto,* is reported at 381 F. Supp. 558, a copy of which is printed in the Appendix to this Brief. A copy of the unreported District Court opinion in *Pryor* is printed in the Appendix to this Brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the United States statutes involved are adequately set forth in the Petition.

QUESTION PRESENTED

Should the Supreme Court review particular factual applications of the Extension of Admiralty Jurisdiction Act to suits arising out of pierside injuries to longshoremen, when those facts fall within the ambit of this Court's holdings in *Victory Carriers v. Law*, and when the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act has rendered moot the issue of unseaworthiness as to subsequent cases?

STATEMENT OF THE CASE

Although the facts and issues in the *Sacilotto* and *Pryor* cases are similar, the context in which the legal issues are presented are different, and are separately described herein.

The Sacilotto Case

Petitioner Henry A. Sacilotto, a longshoreman, was injured in a gondola railroad car on a pier while assisting in the loading of steel billets onto a vessel on navigable waters.

Sacilotto contends that his injury was caused by the manner in which the billets had been loaded into the gondola car by the inland shipper. He concedes that the

loading of the billets was being performed in the normal manner, that the ship's gear was working properly, and that there was no defect or inadequacy in the tools and equipment being used. He testified that the cause of the accident was the failure of the inland shipper to have chocks between the billets in the gondola car. (See opinion of District Court, Appendix to Brief in Opposition, p. 2a.)

Sacilotto filed suit in the United States District Court for the District of Maryland seeking to invoke admiralty jurisdiction and diversity jurisdiction. The District Court dismissed the suit on its finding that it had neither diversity nor admiralty jurisdiction. Sacilotto has not challenged the ruling on the diversity issue. The United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, finding that the injury was not, as required by the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740, *caused* by a vessel on navigable waters, and relying upon the Supreme Court's holding in *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1972).

The Pryor Case

Petitioner Raymond E. Pryor is the personal representative of Marion L. Stephens, a longshoreman who was injured on a gondola railroad car on the pier while assisting in the loading of coils of steel wire onto a vessel on navigable waters. He alleges that he was injured as a result of the defective banding of a coil by the inland shipper when that coil, which was next to coils which were being lifted from the gondola car by the winch, sprang open and knocked him off the gondola car. (Appendix to Petition, p. 5.)

After presentation of plaintiff's evidence at trial, the United States District Court for the District of Mary-

land found a complete failure of proof that would sustain any claimed unseaworthiness or any finding of negligence. (Appendix to Brief in Opposition, p. 14a.) The District Court decision stated that even if there had been proof of the defective condition of the cargo, there was no evidence that the ship actually accepted the coil which was alleged to be defective. (Appendix to Brief in Opposition, p. 13a.)

The District Court found admiralty jurisdiction and the defendant did not appeal that finding since it appeared that diversity jurisdiction was present. On March 17, 1975, the United States Court of Appeals for the Fourth Circuit issued an opinion reversing and remanding the case. Respondent American President Lines filed a Petition for Rehearing, contending that the Circuit Court misapprehended the decision of the District Court in that it failed to recognize that the District Court's holding was based on a complete failure of proof by the plaintiff. The United States Court of Appeals for the Fourth Circuit granted the rehearing and, in its subsequent decision, acknowledged that the District Court did not "find anything wrong with the coils". (Appendix to Petition, p. 6.)

In the *Pryor* case, the Circuit Court deemed it unnecessary to determine whether or not the District Court's finding of admiralty jurisdiction was correct, as the District Court had jurisdiction under the "savings to suitors" clause (Article III, Section 2, Clause 1, United States Constitution) and because diversity jurisdiction existed. (Appendix to Petitioner's Brief, p. 6.) The question decided by the Circuit Court is whether or not the federal maritime law applies to the *Pryor* case so that the plaintiff has a maritime cause of action for unseaworthiness. The Circuit Court held that the maritime law would only be applicable if the facts

found brought the injury within the scope of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740. (Appendix to Petition, p. 7.)

Therefore, the questions arising in both cases — admiralty jurisdiction in *Sacilotto,* and the application of maritime law in *Pryor* — required consideration of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, to the facts.

ARGUMENT

THERE IS NO REASON FOR THE SUPREME COURT TO GRANT THE PETITION

In *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971), this Court defined the limits to which the Extension of Admiralty Jurisdiction Act, 46 U.S.C. 740 (1948), could be used as a vehicle to extend maritime jurisdiction and the application of federal maritime law shoreward from the gangplank in instances of shoreside longshoremen injuries. Both the *Sacilotto* and *Pryor* litigations present straightforward applications of this Court's holdings in *Victory Carriers, Inc. v. Law,* construing the Admiralty Extension Act. The decisions below were correct. They present no conflict of decisions in the Circuits and no important question of law for review by this Court. This is particularly true because the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act have rendered moot the questions presented as to any subsequent cases. A longshoreman no longer has a maritime cause of action against a vessel for unseaworthiness. 33 U.S.C.A. § 905(b); *Hite v. Maritime Overseas Corporation,* 375 F. Supp. 233 (E.D. Texas 1974).

Both Sacilotto and Pryor alleged that their injuries stemmed from defects in the packaging or stowage of goods in a railroad car by some inland shipper. Both

concede that there were no defects in the ship or in the ship's gear which caused injury. The Admiralty Extension Act extends admiralty jurisdiction (and the federal maritime law) "to include all cases of damage or injury, to person or property, *caused* by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. (Emphasis supplied.) Thus, the controlling question in both cases was whether the vessel *caused* the injuries.

In *Victory Carriers, Inc. v. Law*, this Court held that admiralty jurisdiction (and the federal maritime law) did not extend to the claim of a longshoreman injured by a forklift on the pier, even though it was being used to move cargo to be loaded on the ship. As this Court stated:

> "The question presented here is whether state law or federal maritime law governs the suit of a longshoreman injured on a pier while driving a forklift truck which was *moving cargo that would ultimately be loaded aboard ship.*" (Emphasis supplied) 404 U.S. 202, 202-03.

In making clear that causation by a ship on navigable waters, and not the function of the longshoreman in moving cargo at the time of the injury, was the basic requirement for application of the maritime federal law, this Court said:

> "The decision in *Gutierrez* [*v. Waterman Steamship Corp.*, 373 U.S. 206 (1963)] turned, not on the 'function' the stevedore was performing at the time of his injury, but rather upon the fact that *his injury was caused by an appurtenance to the ship,* the defective cargo containers, which the court held to be 'injury to person * * * caused by a vessel on navigable water' which was consummated ashore under 46 U.S.C. § 740. The court has never

> approved an unseaworthiness recovery for an injury sustained on land merely because the injured longshoreman was engaged in the process of loading or unloading." (Emphasis supplied) 404 U.S. at 210-11.

In considering whether the injury to Law was *caused* by a vessel on navigable waters, this Court pointed out facts which it deemed controlling, and which are almost identical to the findings of fact in the instant cases:

> "In the present case, however, the typical elements of a maritime cause of action are particularly attenuated: Respondent Law was not injured by equipment that was part of the ship's usual gear or that was stored on board, the equipment that injured him was in no way attached to the ship, the forklift was not under control of the ship or its crew, and the accident did not occur aboard ship or on the gangplank." 404 U.S. 202, 213-14.

The instant cases present straightforward applications of *Victory Carriers, Inc. v. Law.* The controlling question in both was whether the *cause* of the injury occurred on a ship on navigable water.

In *Sacilotto,* the essential facts were undisputed. (Appendix to Petition, p. 19.) On the undisputed facts, Sacilotto has candidly admitted that the entire cause of his injury was the improper loading by the inland shipper who initially loaded the billets in the gondola car. In *Pryor,* the facts were not undisputed. Although Pryor also charged his injury to improper acts by the inland shipper who initially loaded the coils in the gondola car, American President Lines denied that the coil in question had been improperly banded. The District Court found that Pryor had failed to carry his burden of proof of facts showing either negligence or unseaworthiness. It found no evidence whatsoever of

negligence. It found no indication of a defect in the ship's gear and nothing unsafe about the plan of operations, *and failed to find anything wrong with the coil.* (Appendix to Petition, p. 6.) Therefore, the *Pryor* petition is presented to this Court in a posture where both the trial court and the Court of Appeals have found that Pryor failed to prove facts necessary to even raise the issue which Pryor now seeks to pursue through this Petition.

CONCLUSION

The questions presented in the Petition have been decided by this Court, present no conflict of decisions in the Circuits and are no longer significant under the existing law. It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

DISTRICT COURT'S MEMORANDUM OPINION AND ORDER IN *SACILLOTTO*

Henry A. Sacillotto has brought suit in this Court seeking to have it exercise its Admiralty jurisdiction, Fed. R. Civ. P. Rule 9h[1], in regard to an injury which he suffered in an accident while he was engaged in loading the SS Chenab. The Defendants have moved alternatively to dismiss the case for want of jurisdiction or for summary judgment. For the reasons set out below, Defendant's motion to dismiss will be granted and the case dismissed.

The essential facts of this case are undisputed. Plaintiff, a longshoreman, was engaged in the loading process as an employee of the stevedore (third party defendant), John T. Clark & Co. At the time of the occurrence in question, Plaintiff and his work gang were endeavoring to remove from an open top gondola car, which was sitting alongside the SS Chenab, twenty foot long steel billets measuring four inches by four inches in width. These billets had been placed in the gondola car by the shipper[2] in two stacks, for balance, one over each set of wheels, and were stacked loosely or had been placed in the gondola car with wooden chocks to separate them while still red hot, *causing the chocks to burn out. In any event, they were "dumped in there loose"* (Plaintiff's deposition at p. 12) at the time of the unloading of the gondola and loading of the ship.

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[1] Plaintiff also seeks to invoke diversity jurisdiction but since complete diversity does not exist, this Court is without such jurisdiction.

[2] The shipper was alleged to have been either United States Steel or Bethlehem Steel.

Plaintiff's job on this particular day was to take a "breaking out" wire and place it underneath eighteen billets at a time which were then lifted up slightly allowing Plaintiff to put a wooden chock under the bunch. The lifting was performed by the ship's boom. Normally, after the chock is put in, the billets are lifted higher and the wire is moved further along to prevent slippage and then a chock is placed under the other end of the batch by another longshoreman to allow chains to be placed around the group of billets for lifting onto the ship. When the billets were lifted after chocking, a loose billet, one not in the batch being lifted, *which had been bowed from the weight of the billets above it, sprang up and hit Plaintiff injuring him.* (Plaintiff's deposition at p. 26). According to Plaintiff, the actual cause of the accident was the failure to have chocks between the billets while in the gondola car and thus allowing such a bowing to occur from the weight of the billets scattered above it. (Plaintiff's deposition at pp. 32-35). He testified that such bowing *often occurs in unchocked loads but is unlikely to occur when chocks are properly placed between them.* (Plaintiff's deposition at p. 34). He further testified that the unloading was being done in the normal manner and that the ship's gear was working properly. (Plaintiff's deposition at pp. 25-26).

In his complaint, Plaintiff proceeded to allege in boiler plate fashion both the negligence of the Defendants and unseaworthiness of the vessel each based upon five possible theories (among others):

a. failing to provide the Plaintiff with a safe place to work;

b. failing to supply the Plaintiff with proper gear and safety equipment for working said cargo;

c. failing to provide the Plaintiff with a sufficient number of competent co-workers;

d. failing to inspect the working area where the work was performed so as to warn the Plaintiff of the dangerous conditions thereon;

e. failing to have a safe plan of operation.

In his answers to the interrogatories propounded to him, Plaintiff specified that his claim of unseaworthiness of the SS Chenab arises from ship Defendant's:

1. failure to have a safe plan of operation in allowing the going cargo to be placed in the unsafe and dangerous condition;
2. failure to properly inspect the working area;
3. failure to warn Plaintiff of the dangerous and unsafe condition of the billets; and
4. failure to supply a safe place to work.

Thus, Plaintiff apparently has abandoned theories b and c of his unseaworthiness allegation.

Unseaworthiness arising from failure to inspect and warn of the discovered dangerousness of the going cargo is factually inapplicable since Plaintiff himself testified at deposition to having had a full awareness of the danger prior to the accident. (Plaintiff's deposition at p. 24). The same reasoning would apply to these two theories of negligence.

Again from the facts it appears that neither the alleged failure to supply proper gear and safety equipment nor a sufficient number of competent co-workers contributed in any way to the accident. Plaintiff testified that the equipment was working properly and no demonstration has been made of a causal nexus between the actions or inactions of a co-worker and the injury to Plaintiff or that the use of an additional co-worker might have prevented the accident.

Thus, the only remaining theories which are factually suitable for discussion of their legal merit are:

I. Negligence.
   A. Failure to provide a safe place to work.
   B. Failure to provide a safe plan of operation.

II. Unseaworthiness.
   A. Failure to provide a safe place to work.
   B. Failure to provide a safe plan of operation in allowing the going cargo to be placed in an unsafe and dangerous condition.

Each of these possible theories is merely an attempt to put into "legalese" this basic question: Whether the ship can be held responsible for an injury to a longshoreman loading the ship which was the result of the cargo having been placed into a gondola for transport to the ship in a dangerous fashion where the injury occurs during that phase of the loading operation which transpired on shore. In other words, does the failure by the shipowners to prevent the shipper's negligence from injuring Plaintiff either by developing a suitable plan of operation or possibly insisting that the shipper properly load the cargo in the gondola (i.e. require the gondola be a safe place to work), give rise to liability of the shipowner?

It is clear that a defective or unsafe plan of operation for loading the ship can render a ship unseaworthy. *Tucker v. Calman Steamship Corporation*, 457 F.2d 440 (4 Cir. 1972). Similarly, the failure to provide a reasonably safe place to work can render a ship unseaworthy. *Croley v. Matson Navigation Company*, 439 F.2d 788 (5th Cir. 1971), *Calderola v. Cunard Steamship Co.*, 279 F.2d 475 (2 Cir. 1960). Either theory may, of course, constitute actionable negligence and generally, these duties are non-delegable. *Petterson v. Alaska S.S. Co., Inc.*, 205 F.2d 478 (9 Cir.), *aff'd Alaska S.S. Co., Inc. v. Petterson*, 347 U.S. 396 (1954), M. Norris, *Maritime Personal Injuries* 2d Ed. at p. 83 (1966).

However, the jurisdictional question is more difficult, because while there may arguably be theoretical tort or liability of the ship under these facts, the admiralty jurisdiction of the court will not be as extensive. Thus, it is possible to spell out a "good" claim sounding in negligence or unseaworthiness and yet not fall within the jurisdiction of the Court. Such distinctions must be drawn as a result of recent Supreme Court "teaching" on the subject of the shoreward extent of admiralty jurisdiction.

In *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1962) the Court found that the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740 which provides that vessels on navigable water are liable for damage or injury "notwithstanding that such damage or injury be done or consummated on land" was the proper jurisdictional basis upon which a longshoreman could recover where he was injured during the unloading process when he slipped on beans spilled from a defective cargo container which had been part of the ship's cargo. The Court stated that since the ship was "negligent in allowing the beans to be unloaded in their defective bagging, when it knew or should have known that injury was likely to result . . ." coupled with the breach of its absolute, non-delegable duty towards the longshoreman engaged in the unloading process, the ship was liable. (At p. 210-211). The Court specifically rejected the reading of the statute which would have limited the reach of the statute

> "to injuries actually caused by the physical agency of the vessel or a particular part of it — such as when the ship rams a bridge or when its defective winch drops some cargo onto a longshoreman." (P. 209-210).

The Court's specific holding was:

> "the case is within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and the impact of which is felt

> ashore at a time and place not remote from the wrongful act." (At. p. 210, footnote omitted).

As the law stood after *Gutierrez,* the facts of the instant case would seem to fall within the admiralty jurisdiction insofar as the ship was arguably negligent in not insisting upon proper chocking by the shipper or devising a safe plan to deal with unchocked loads, and the impact of this arguable negligence was felt ashore during loading nowise remote in time or place. However, *Victory Carriers, Inc. v. Law,* 404 U.S. 202 (1971) restricts the applicability of the *Gutierrez* approach and renders this case without the reach of the Extension Act.

Law involved an injury to a longshoreman who was engaged in the loading process who was injured when the overhead protection rack of the forklift he was operating on the pier alongside the ship came loose and fell on him due to its defective condition. The Supreme Court held that a longshoreman may not recover "in admiralty when he is injured on the dock by his *employer's equipment* at the time he is engaged in the service of a ship located on navigable waters." (At p. 210, emphasis added). They then distinguished *Gutierrez* by saying:

> The decision in *Gutierrez* turned, not on the "function" the stevedore was performing at the time of his injury but, rather, upon the fact that his injury was caused by an *appurtenance of a ship,* the defective cargo containers . . . (P. 210-211, emphasis added).

Thus, where the injury is caused by something unrelated to the ship (e.g. defective forklift) there is no jurisdiction, but where it is caused by an appurtenance of the ship (e.g. unloaded cargo) there is jurisdiction. In the instant case, the steel billets had not as yet been rendered cargo and were therefore not an appurtenance of the ship so that this shorebased injury is not within the shoreward extension of admiralty jurisdiction occasioned by the Act as articulated by the *Gutierrez* case. This is so since the ship is charged with

warranting the manner in which the cargo is stowed on board, *Richard v. Ellerman & Bucknall S.S. Co.*, 278 F.2d 704 (2 Cir. 1960) but not the cargo itself, *Morales v. City of Galveston*, 370 U.S. 165 (1962), and since the billets were not yet an appurtenance of the ship (anymore than was the gondola car in which they were brought alongside) this warranty cannot extend to them nor can the logic of *Gutierrez*. The defect of being improperly placed in the gondola car while alongside the ship awaiting loading on to the ship is not a breach of the stowage warranty (for indeed it was the shipper, not the ship, who stowed the billets in the gondola improperly) nor is it an injury caused by the ship or its appurtenances (since the clear cause of the injury was the manner in which the billets were stowed in the gondola).

As noted in note one, above, Plaintiff also sought to invoke the diversity jurisdiction of this Court, 28 U.S.C. § 1332. However, since Plaintiff has named as a party-defendant a Maryland corporation, John S. Connor, Inc.[3], there is no complete diversity and thus the Court is without jurisdiction.

It should be noted, that this point was raised by counsel for the defendant United States Steel early on in the proceedings and Plaintiff has made no attempt to conform his pleadings to the requirements of § 1332. Therefore, the lack of diversity, coupled with the lack of admiralty jurisdiction renders this Court without subject matter jurisdiction and the complaint must be dismissed.

R. DORSEY WATKINS,
United States District Judge.

May 30, 1974

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[3] See transcript February 25, 1972, at p. 4.

DISTRICT COURT'S OPINION IN *PRYOR*

(The Court) Good afternoon.

Gentlemen, before we proceed with the taking of evidence in Civil Action Number 71-76HM, the Court has had an oral motion filed in Civil Number 71-351 HM which should be ruled on at this time. The motion is one made under Rule 41(b) of the Federal Rules of Civil Procedure by the Defendant American President Lines.

Rule 41(b) provides that after the Plaintiff in an action tried by the Court without a jury has completed the presentation of his evidence, the Defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the Plaintiff has shown no right to relief.

The suit by the Plaintiff, Marion L. Stephens, initially was brought against American President Lines by him under Rule 9(h) of the Federal Rules, and following the later death of Mr. Stephens, and filing of a Suggestion of Death on the record, the present named Plaintiff, Raymond E. Pryor, as Personal Representative, was substituted for Mr. Stephens. The suit sought damages for an injury to Mr. Stephens which occurred as the vessel S. S. PRESIDENT PIERCE was in the course of being loaded at the Pennwood Wharf in Baltimore on the 12th day of September, 1969.

At the time we are concerned with, the Plaintiff was a longshoreman employed by the Nacirema Operating Company of Baltimore. There were coils of steel wire being loaded onboard the vessel from a railroad gondola car at the time of the incident with which we are concerned. The coils of wire were apparently stowed in the gondola car in two rows of coils laid end to end in the floor of the car, and then one row of coils above the two in the bottom of the car. The particular load that was being taken aboard the vessel at the time was from the top row of coils in the car.

The only evidence with regard to how the accident occurred is that of the deceased original Plaintiff, Marion L. Stephens, whose deposition, taken on December the 15th, 1972, has been entered in evidence as Plaintiffs' Exhibit Number 1. I will refer to that deposition in a moment, but first I would like to point out that in the complaint as originally filed in the case, the occurrence of the accident is briefly described in paragraph five of the complaint as having occurred as follows "that in the course of discharging his duties as a longshoreman, the Plaintiff was in a gondola car when suddenly a coil of wire which was being raised out of the gondola car by a crain caught the Plaintiff, knocking him off of the gondola car, injuring him."

There are two other statements in the Court's file which contain the contentions of the Plaintiff as to how the incident occurred and those statements are contained in two separate pretrial orders, one filed December the 15th, 1972, and the other on March the 15th, 1974. In the first of those two pretrial orders, paragraph one, which sets out the factual contentions of the Plaintiff, states that the Plaintiff intends to prove that on the 12th day of September, 1969, he was employed as a longshoreman and that in the performance of his duties as a longshoreman, he was on top of a gondola car, assisting in loading coils of wire, and that after hooking up a draft of wire, the said draft was raised by the ship's winches. As it was being raised, an end of a coil of wire which was not banded and which had been intertwined with the coil being raised suddenly broke loose and caught the Plaintiff's leg, knocking him from the gondola car to the ground, a distance of approximately 18 feet.

In the most recent pretrial order, that filed on March the 15th, 1974, the statement of how the accident occurred is very similar to that in paragraph 5 of the complaint. It reads in the pretrial order as follows "While in the course of discharging his duties, he was in a gondola car when a coil of wire being raised out of

the car by a crane caught him and knocked him off the gondola car, injuring him."

The difficulty with the three versions of the accident as I have just read them, one from the complaint and two from the pretrial orders, is that the facts on which the Court must proceed don't agree with those statements. The only hard evidence as to how the accident occurred is that contained in the deposition of Marion Stephens taken on December the 15th, 1972. There are two places in that deposition which describe the occurrence of the accident. The first, at pages 11 and 12 of the deposition, contain this answer by Mr. Stephens as to a question about the coil involved: The question was "now the coil that was involved here, was that a coil which you had hooked up or which Claude had hooked up? Answer: Neither one. I hooked four coils up with the wire and I hooked it back to the winch, and I told the man myself, the deck man, to take it away. Which in turn I walked down past the other coils so they could drag it back so I would be clear. And when the four coils took the weight off the other coil, it was an open end and it sprung away. And the next coil, the bitter end of the coil, caught me in the trouser leg and sprung out and flipped me right off the gondola car. I didn't even know it had me until I was on the ground."

And the second description by the deceased as to how the accident occurred is contained at pages 18 through 20 of this deposition, beginning at line 20 on page 18. And this is an answer by Mr. Stephens. "And when he pulled this wire away, this other coil shifted and sort of sprung. I guess it wasn't — Question: Now let me back up just a little bit now. When you say you were four feet away from the coils that you were hooked up to, do you mean you were four feet back of the closest — Answer: I wouldn't say exactly four feet. This is approximately. Question: Right. How far were you away from the closest part of the coil that was going to be lifted? Answer: I was completely clear of the one that was going to be lifted. Question: A foot, five feet? Answer: I would say two foot. Question: Two feet clear of the

closest end? Answer: Yes. Question: Now, when they lifted that took the strain, took the weight of that off the other coils and something shifted. Now, what shifted? Answer: I guess it was the other coil of wire. Question: On the top row? Answer: Yes. Question: In other words, sort of like an accordian, it opened up a little bit? Answer: Right. Question: It opened up? In other words, it didn't jump up in the air or settle, it shifted horizontally? Answer: Well, yes, it moved. Question: And when it opened, what happened? Answer: One of the jagged ends from the wire caught my trouser leg and just flipped me off that gondola car. Before I knew what happened, I was on the ground. I mean, you don't expect it to happen."

The evidence in the deposition also tends to indicate that the manner of lifting these coils was that a wire would be put through the center hole of the coils, and at each end of that wire was an eye which was attached to a hook at the bottom of the vessel's cargo cable, and in that way, the coils taken out of the gondola car with the power of the vessel's winch.

It seems clear to the Court, from the deceased's own testimony, that contrary to what is suggested in the complaint and at least one of the pretrial orders, that the coil of wire that caused him to fall off the gondola car was not one being lifted at the time, but rather was one that moved slightly after coils which had been threaded with this wire began to be lifted and thus lessened the tension against the remaining coils in the row on the top of the car.

Now, those are the facts in the case as the Court understands them. The next question is what legal result, if any, obtains on that state of facts.

The Plaintiff in the case, as the Court understands it, does not claim that the winch operator onboard the ship was in any way negligent in the way he started to take a strain on this load that was about to be loaded when the deceased was injured; rather, the theory of liability put forth by the Plaintiff is based on a claim of unseaworthiness. The claim of unseaworthiness appar-

ently does not relate to any defect in any of the vessel's gear or equipment; rather, it is a three-pronged claim, the first prong of which is a contention that the ship failed to supply a safe place to work; second, that the ship had accepted defective cargo; third, that there was an unsafe plan of operation, in the sense that the deceased, Marion Stephens, should have been required by the vessel owner to move further away from the cargo being loaded at the time his injury occurred.

The first question that the Court has to face in connection with this unseaworthiness claim made by the Plaintiff is whether or not the Court has jurisdiction in admiralty in this suit. The Court is satisfied that it does have admiralty jurisdiction in the matter, and I might say a word or two in that connection. The basic dividing line of jurisdiction in cases of this kind, as it has evolved under the decision in the Supreme Court in Victory Carriers, Inc. versus Law, is the end of the pier, as it is sometimes referred to, in the sense that if there is a shore-based accident involving a longshoreman or other maritime worker which is brought about by shore-based equipment, then there is no admiralty jurisdiction.

Mr. Lentz, counsel for the Plaintiff, the Court knows, is very familiar with the case of Snyder versus Villain and Fassio, which is reported in 459 Fed. 2nd 365, since he was counsel for one of the parties in three of the cases, I believe, that were decided in that appeal. The dismissal by the District Court Judge in those cases was upheld by the Court of Appeals under the authority of the Victory Carriers case because in each injury that was reviewed on that appeal, the Court noted that the injury was not caused by equipment which was part of the ship's gear, or by any equipment attached in any way to the ship, or under the control of the ship or its crew and, therefore, there was no maritime cause of action.

One of the cases reviewed in that appeal, that of William Randolph, was somewhat similar in a way to the facts in the present case, in that it involved a longshoreman who was standing in a gondola car on

the pier, and he was struck by the hook of a suddenly descending crane cable and knocked out of the gondola car onto the ground. Judge Watkins in the District Court found no admiralty jurisdiction in that case, and he was affirmed on appeal on the basis that the crane was a shore-based crane, and the accident took place on land and, therefore, there was no maritime jurisdiction.

There is a difference in the present case in the sense that we are not dealing with the shore-based cranes, we're dealing with ship's equipment in the form of a crane onboard the vessel. And, therefore, it seems to the Court that the legal basis for admiralty jurisdiction is very similar to that set out by Senior Circuit Judge Sobeloff in the case of Tucker versus Calmar Steamship Corporation in footnote one of that opinion at page 442 of 457 Fed. 2nd. In general, he pointed out, as the Court has just indicated, that where a longshoreman working on a pier is injured by shore-based equipment, there is no admiralty jurisdiction, but where the equipment being used is connected to the vessel, then there may be admiralty jurisdiction.

Now, this case, of course, does not involve actually and physically a coil being lifted by the vessel's gear at the time, but still the vessel's gear was being utilized in this loading operation, and in the Court's view, that is sufficient in this case to sustain admiralty jurisdiction. The difficulty, however, as the Court sees it, with the Plaintiff's case is that there has been a failure of proof that would sustain any claimed unseaworthiness as far as the vessel is concerned. It does not appear that there was any defect in any of the vessel's gear that was being used. It does not appear that there was any actual defect in the cargo that was being loaded at the time. Additionally, the Court is not satisfied that even if there had been specific direct proof of some defective condition of the cargo, such as improper banding of the coils, or nonexistent banding of the coils, that there has been any evidence in this case that the vessel actually accepted the coils which the Plaintiff says caused his injury, in the sense that

the longshoremen had not yet touched that coil, as far as the Court can see from the evidence, or made any attempt to try to take it onboard the vessel. It was simply an inert coil, laying on the top of the gondola car, which happened to move slightly as other coils were being lifted. The Court sees nothing unsafe with the plan of operation here. The accident apparently was an unexpected one. And the Court would not find anything from the evidence which would support a ruling that there was any responsibility on the vessel to direct Mr. Stephens to stand further away from the coils being lifted at the time this accident occurred.

In short, the Court feels that there has been a failure of proof to sustain any finding either of negligence or of unseaworthiness on the part of the vessel and, therefore, the Court would have to grant the motion under Rule 41(b) which has been filed by the Defendant American President Lines.